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State of Utah, By and Through Its Road Commission v. George Kendell and Irene H. Kendell, his Wife; Earl M. Kendell, and Flora H. Kendell, his Wife; Rulon E. Williams and Viola R. Williams. his Wife; and Utah Sand and Gravel Products Corporation, A Utah Corporation : Supplemental Brief of Appellant

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In The Supreme Court of the State of Utah

STATE OF UTAH, by and through its ROAD
COMMISSION,

Appellant,

VS.

GEORGE KENDELL and IRENE H. KENDELL,
DELL, his wife; EARL M. KENDELL,
FLORA H. KENDELL, his wife; JAMES
E. WILLIAMS and VIOLA E. WILLIAMS,
his wife; and UTAH SALT AND GRAIN
PRODUCTS CORPORATION, a Utah
corporation,

SUPPLEMENTAL BRIEF OF APPELLANT

Appeal from the Judgment of the
Court of Weber County, rendered

RICHARD H. THORNTON,
200 Kiesel Building
Salt Lake City, Utah
Attorney for Respondents.

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In The Supreme Court of the State of Utah

STATE OF UTAH, by and through its ROAD
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GEORGE KENDELL and IRENE H. KEN-
DELL, his wife; EARL M. KENDELL, and
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E. WILLIAMS and VIOLA R. WILLIAMS,
his wife; and UTAH SAND AND GRAVEL
PRODUCTS CORPORATION, a Utah cor-
poration,

Respondents.

Case No.
10834

SUPPLIMENTAL BRIEF OF APPELLANT

A. Distinction Between Police Power Regulation and Taking by Condemnation

In connection with the principle raised in Point II, it should be pointed out that the trial court erred in the admission of evidence pertaining to profits and loss thereof following the erection of the wire fence which altered the access of the business customers of defendant.

(See Tr. 9, 15, 16, 17 and particularly 56 and 45-50.)

It is well established in the State of Utah that a state has full power to adjust access from private property to a public thoroughfare. See **Springville Banking v. Burton**, 10 U.2d 100, 349 P.2d 157 (1960); **State v. Parker**, 13 U.2d 65 (1962); and particularly in point, **Weber Basin Water Conservancy District v. Hilsop**, 12 U.2d 64, 362 P.2d 580 (1961); **Utah Railroad Commission v. Hansen**, 14 U.2d 305, 383 P.2d 917 (1963); **Sine v. Helland**, 18 U.2d 222, 418 p.2d 979 (1966).

See also an interesting annotation in 91 A.L.R.2d 963. (The case of **Springville Banking Co. v. Burton**, *supra*, is cited in the annotation.)

In this case, the overriding principle before the court is whether or not the State of Utah can adjust an access-way to and from private property to a public thoroughfare, even though such adjustment results in a diminution in the market value of said private property.

It is readily conceded that the State must pay for a "**taking**" of private property for public use, (see Article I, Section 22, Constitution of Utah), but in such instances, the State only must pay for the reduction in the value of the property **taken** by virtue of its exercise of the power of eminent domain. It is equally true, as the cases above have uniformly pointed out, that the State by the exercise of its **police pow-**

ers in the regulation use of private property, even though such regulation impairs rights in property and significantly reduces the free exercise of the rights in said property by its owner.

If the public interest is served thereby no damages are recoverable. It therefore follows that the trial judge was in error in admitting evidence relating to the reduction of business to defendants occasioned by the erection of the wire fence, adjacent to the new freeway.

If the courts allow the defendants in this case to submit evidence regarding the reduction of business occasioned by the construction of said fence, the effect thereof is to overrule the Springville Banking case and all other Utah jurisprudence.

B. Waiver

It is strongly urged by Respondent that the Appellant in this case is now foreclosed from raising the error of the trial court on appeal.

At the trial court level, appellant herein submitted Instruction No. 12 (see Transcript p. 28-A). It is conceded that the wording of said instruction does not precisely verbalize the principal of law used by Appellant as a basis for reversal in this case. However, the **substance of the requested instruction** which was denied by the trial judge contained the same legal precept here contended for.

In addition thereto, the Appellant, after learning of the verdict and judgment rendered thereon, filed a motion for a remittur, and shortly thereafter filed a motion for a new trial alleging as a reason thereafter the same reason that is asserted under Point II in Appellant's Brief. Appellant certainly can be said to have cured any asserted acquiescence to the admission of said prejudicial evidence by the Defendant-Respondents.

Appellant, in support of the motion for new trial, submitted to the trial court and counsel a trial brief (see Transcript p. 36) which delineates the same notions which are advanced here. It is strongly urged that the application of the exception to doctrine of waiver incorporated in Utah Rule of Civil Procedure 51 has been fully complied with in this case when it is considered that the State stands to lose \$40,000, plus interest, from the date of judgment if this award is allowed to stand.

It would be unreasonable and inequitable to apply the doctrine of waiver in this case considering (1) the fact that a new trial was convened and the court had before it the theory on which this appeal is based. In addition thereto, the unjust result which would accrue in the event the escape hatch which Rule 51, Utah Rules of Civil Procedure provides is not employed by this court would be unconscionable and in direct conflict with the long standing

position taken by this court in cases indistinguishable on their facts. If the theory of the Defendant-Respondents is allowed to stand in this case they would be able to accomplish indirectly what this court and the overwhelming majority of respectable american jurisdictions have prohibited. A concrete fact situation may be used for illustration; Assume: (1) Appellant placed the fence in question in the exact place where it actually was located five years prior to the condemnation action and subsequent highway construction. (2) A condemnation action is commenced five years following the erection of said fence along exactly the same route which the State actually used in this case. It couldn't be argued that the establishment of the fence by the State wasn't a legitimate exercise of its police power in so regulating the flow of traffic. It could not be doubted that defendants would have any legitimate claim as against the State for damages by virtue of such legitimate regulation. Therefore, it is only by the fortuitous circumstance of the coincidental establishment of the fence and the taking which distinguishes this case from the long line of well-reasoned opinions from this court denying compensation for exactly the same type of regulation for which defendant demands damages herein. Indeed, it would seem that if the court allows this judgment to stand,

it is in effect enacting a "private of special law . . . where a general law (could) be applicable . . ."

CONCLUSION

The record reveals clearly that a plethora of inadmissible and highly prejudicial evidence was admitted at the trial level. The conclusion is irresistible considering the Jury's award that the inadmissible evidence was strongly considered in arriving at the verdict.

Respectfully submitted,

STEPHEN L. JOHNSTON,

Special Assistant Attorney
General

431 South 3rd East
Salt Lake City, Utah
Attorney for Appellant